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Workmen's Compensation

Henry D. Akin

WORKMEN'S COMPENSATION

by

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THE pitched battle in the workmen's compensation field between literal application and liberal construction is still being waged in Texas courts. In the landmark case of *Mingus v. Wadley*[1] the Texas Supreme Court, speaking through Chief Justice Cureton, established the rationale for the literal view:

> This suit arises out of a workmen's compensation proceeding, and it is therefore in derogation of the common law. The rights to be enforced, and all the remedies provided therefor, are purely statutory, as distinguished from the common law rights and remedies. . . .
>
> The general rule is that where the cause of action and remedy for its enforcement are derived not from the common law but from the statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable.[2]

Compare the above language with the recent use of the timeworn cliché: "The remedial statutes in the Workmen's Compensation Law should be liberally construed with the view to accomplish its purpose and to promote justice. . . . They are given a broad and liberal construction by the courts in order that the humane purpose of their enactment may be realized."[3] The battle line is sharply drawn in other cases.[4] It appears from recent decisions that the courts sometimes apply the provisions of the Texas Workmen's Compensation Act literally, but more often liberally construe its provisions, dependent to a certain extent on the merits of the case and the viewpoint of the examiner.

I. Scope of the Act

Extraterritorial Provision. During the past year the appellate courts had occasion to re-examine the extraterritorial provisions of the Texas Workmen's Compensation Act.[5] Reaffirmed was the well-established rule that the true test of coverage is whether the employee occupied the "status of a Texas employee;" that is, whether it was contemplated that he would work for the subscriber in Texas (the judicial standard) rather than whether he was hired in Texas (as set out by the legislature). For example, where a

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[1] 115 Tex. 551, 285 S.W. 1084 (1926).

[2] *Id.* at 557, 285 S.W. at 1087.

[3] Texas Employers' Ins. Ass'n v. Thomas, 415 S.W.2d 18 (Tex. Civ. App. 1967). *See also* Phoenix Ins. Co. v. Bradley, 415 S.W.2d 928 (Tex. Civ. App. 1967), where the court stated, "The Texas Workmen's Compensation Act must be given a liberal construction to carry out its evident purpose."

[4] *Compare, e.g.*, Liberty Mut. Ins. Co. v. Smith, 410 S.W.2d 27, 34-35 (Tex. Civ. App. 1966) *error ref. n.r.e.* (dissenting opinion) *with* King v. Texas Employers' Ins. Ass'n, 416 S.W.2d 533, 538 (Tex. Civ. App. 1967) *error ref. n.r.e.*

[5] Tex. Rev. Civ. Stat. Ann. art. 8306, § 19 (1967).

claimant was hired in Texas by a Texas employer but was injured in an automobile accident in England and had not worked in Texas prior to going overseas, it was held that the claimant might have the status of a Texas employee under the extraterritorial provisions of the Act if his employment contract encompassed work in Texas at some subsequent date.[6] The judgment of the trial court was reversed and remanded in order to permit claimant to develop this issue in view of the recent decision of the Texas Supreme Court in *Texas Employers' Insurance Ass'n v. Dossey*.[7] That case held that an employee's status is fixed by his employment to work in Texas as well as in another state and the employee continues to occupy this status even though he first works in the other state.

Policy Limitation. A court of civil appeals considered the scope of a policy of workmen's compensation and employers' liability insurance which provided that the policy applied "only to injury or death sustained in the United States of America, its territories or possessions, or Canada."[8] An employee was killed when the aircraft in which he was riding on company business between two points in Texas crashed into the Gulf of Mexico, twenty-one miles from the Texas coast. It was held that this accident was not within the scope of the coverage since "The high sea does not form part of the territory of any nation. No nation can have over it any right of ownership, sovereignty or jurisdiction."[9]

Seamen. Claimant received an injury while working as a seaman aboard a shrimp boat. He submitted a claim under the Longshoremen's and Harbor Workers' Compensation Act[10] and was awarded compensation. He then sued his employer based on unseaworthiness of the boat. The court of civil appeals, reversing the summary judgment granted the employer, reasoned that, while the Act apparently bars an employee from suing his employer, the United States Supreme Court has held to the contrary where the cause of action is based on the unseaworthiness of a vessel owned by the employer.[11]

Non-Payment of Premium. The fact that the employer has failed to pay the premium on the workmen's compensation policy does not prevent the employer from being a subscriber and does not prevent the employees from being within the scope of the Act. Even though the employer failed to report her son as an employee on the payroll turned in to the insurer, so that no premium had been paid on him, a court of civil appeals held that the injured employee was covered by the policy since "protection is not lost because his employer failed to pay the proper premium to the insurance

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[6] Maryland Cas. Co. v. Spritzman, 410 S.W.2d 668 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[7] 402 S.W.2d 153 (Tex. 1966), *discussed in* Akin, *Workmen's Compensation, Annual Survey of Texas Law*, 21 Sw. L.J. 75, 76 (1967).

[8] Employers Mut. Cas. Co. v. Samuels, 407 S.W.2d 839 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[9] *Id.* at 841.

[10] 33 U.S.C. §§ 901-950, 44 Stat. 1424 (1927).

[11] Terry v. Southeast Packing Co., 416 S.W.2d 624 (Tex. Civ. App. 1967).

company."[12] It has also been held immaterial, so far as an injured employee is concerned, whether the premiums were paid or the manner in which they were paid.[13]

II. Extent of Coverage

Domestic Servants. The Workmen's Compensation Act specifically states that its provisions shall not apply to personal injuries sustained by domestic servants.[14] In *Hardware Dealers Mutual Fire Insurance Co. v. King*[15] the claimant was hired to work as a general "handy woman" for a family-owned corporation and her compensation was three times the rate for domestic servants in the area. In addition to cleaning and maintaining the corporate offices, she was expected to do almost anything necessary in the furtherance of the business of the corporation. This sometimes included cleaning, cooking and baby-sitting in the homes of the corporate officers. The court of civil appeals upheld an award to claimant for injuries sustained while performing domestic work in an officer's home. The Texas Supreme Court reversed over a strong dissent.[16] The court observed that Mrs. King was engaged to work both as a domestic servant and as an employee of the automobile agency and was injured while working as a domestic servant, not while working under that part of her employment contract providing that she work for the agency. The court further stated that she was not within the statutory definition of "employee"[17] at the time of the injury since the domestic work was not in the usual course of the business of the agency and she had not been temporarily directed or instructed to perform the work by her employer.

Independent Contractor. In addition to the domestic servants exclusion, the courts examined and reiterated the rule that an independent contractor or an employee of an independent contractor is not covered by workmen's compensation insurance taken out by the person engaging the services of the independent contractor.[18] Where a truck driver for a delivery service was injured while making a contracted delivery, the truck driver remained in the regular employment of the delivery service and was not a loaned employee of the company whose freight he was delivering. His regular employer was held liable for workmen's compensation benefits, even though he was instructed to do whatever the freight company desired him to do.

A similar rationale was used where the general contractor, an electrician, had subcontracted welding work to a subcontractor who, finding it physically impossible to complete the work, had turned it over to claimant. The court held that the claimant was an independent contractor or an em-

[12] Coal Operators Cas. Co. v. Richardson, 414 S.W.2d 735 (Tex. Civ. App. 1967) *error ref. n.r.e.*
[13] Le Jeune v. Gulf States Utilities Co., 410 S.W.2d 44 (Tex. Civ. App. 1966) *error ref. n.r.e.*
[14] Tex. Rev. Civ. Stat. Ann. art. 8306, § 2 (1967).
[15] 11 Tex. Sup. Ct. J. 99 (1967).
[16] *Id.* at 103.
[17] Tex. Rev. Civ. Stat. Ann. art. 8309, § 2 (1967).
[18] Central Sur. & Ins. Corp. v. Smith, 410 S.W.2d 14 (Tex. Civ. App. 1966).

ployee of an independent contractor and was not an employee of the general contractor for workmen's compensation purposes.[19]

Course of Employment. While the Act does not specifically so provide, it is well established that for an injury to fall within the scope of the Workmen's Compensation Act it must have been sustained in the course of employment as defined by the Act.[20] Whether or not the injury in question was so sustained was contested in numerous cases during the past year.

In one, decedent and a fellow employee were employed by a liquor store. They were required to work together and were closing the store; decedent had a daily report in his hand to be mailed to his employer. The fellow employee's insane cousin, intending to kill only the fellow employee, shot and killed both men. In spite of the provision of the Act that "injuries sustained in the course of employment" shall not include "an injury caused by an act of a third person intended to injure the employee because of reasons personal to him and not directed against him as an employee, or because of his employment,"[21] the court held these facts sufficient to support the finding that decedent was in the course of his employment at the time he was killed.[22]

In another case involving course of employment, claimant worked on a day basis for his mother who operated a logging business. On a Sunday evening he drove a truck, owned by his mother and used in her business, to view logs. In considering whether claimant was insured while returning by a different but direct route, the jury found that at the time of his injury the claimant was his mother's employee and was in the course of his employment. The judgment in favor of claimant was affirmed.[23]

An unusual fact situation was presented where a truck driver fell off a bridge while hunting for a billfold belonging to one of the occupants of a wrecked automobile which blocked the highway. This was held to present a prima facie case of injury while in the course of the truck driver's employment.[24] Although he was not actually doing what was specifically prescribed to him, in view of the emergency he was doing what he thought was necessary for the purpose of advancing the work in which he was engaged for his employer. Although the court found no Texas case close in point on the facts, it cited and distinguished *Safety Casualty Co. v. Wright*.[25] That case held that a pipeline inspector who had walked down a pipeline and was returning by bus was not in the course of his employment when injured while helping the bus driver change a tire. The instant case was distinguished from *Wright* because an emergency was herein involved.

In another unusual case,[26] a hotel desk clerk was injured in two assaults,

[19] Goodnight v. Zurich Ins. Co., 416 S.W.2d 626 (Tex. Civ. App. 1967) *error ref. n.r.e.*

[20] TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1967) (definition of "injury sustained in course of employment").

[21] *Id.*

[22] Travelers Ins. Co. v. Hampton, 414 S.W.2d 712 (Tex. Civ. App. 1967) *error ref. n.r.e.*

[23] Coal Operators Cas. Co. v. Richardson, 414 S.W.2d 735 (Tex. Civ. App. 1967) *error ref. n.r.e.*

[24] Texas Employers' Ins. Ass'n v. Thomas, 415 S.W.2d 18 (Tex. Civ. App. 1967).

[25] 138 Tex. 492, 160 S.W.2d 238 (1942).

[26] Phoenix Ins. Co. v. Bradley, 415 S.W.2d 928 (Tex. Civ. App. 1967).

some thirty or forty minutes apart, by a fellow desk clerk following a quarrel over repeated telephone calls requesting the assailant to report to work. Since the assaults grew out of the work being done for the employer and the testimony showed that the claimant was not the aggressor, claimant was held to be in the course of his employment.

A change of pace is noted where an employee, after leaving the oil field where he had repaired his employer's equipment, was killed in a noon-hour collision on a road which was not on the direct route to his employer's shop but was on a direct route to the home of a friend with whom he had agreed to have lunch.[27] It was held that there was no evidence of a probative value that he was in the course of his employment at the time of his death.

III. JURISDICTION

Jurisdiction of the Industrial Accident Board. In his concurring opinion in *Employers Reinsurance Corp. v. Holt*[28] Chief Justice Calvert of the Texas Supreme Court stated that the Industrial Accident Board "has jurisdiction of every claim filed seeking benefits under the Texas Workmen's Compensation Act. It has jurisdiction to grant the claim, in whole or in part, and to deny it. If it does not make an award of benefits, it should deny the claim."[29] In the instant case, the Board had dismissed the claim for want of jurisdiction. The claim had been pending for more than eight years, and the Board noted that "the courts have held that this Board is without jurisdiction to act on a claim after a period of 401 weeks following the date of the injury." The supreme court held that this order of the Board was final and appealable. Chief Justice Calvert's opinion should put the matter to rest by its forthright statement that "there should be no occasion for continuing the confusion" created by the "practice of refusing to act on claims for compensation for want of jurisdiction or of dismissing them for that reason."[30] Surely the Board will take the hint and be guided accordingly hereafter.

Jurisdiction of Courts. In a case of first impression,[31] claimant filed a timely notice of unwillingness to abide by the final award of the Industrial Accident Board, which had denied his claim for compensation, and filed suit against just one insurance company. He then named another insurance company as co-defendant in his second amended original petition which was filed more than four months later. It was held that the court lacked jurisdiction over the second insurance company because suit was not filed against it within twenty days following the notice of unwillingness to abide by the award as required by the general statute of limitations.[32] The filing of the suit against one insurance company did not toll the statute as to the

[27] Texas Employers' Ins. Ass'n v. Brown, 415 S.W.2d 260 (Tex. Civ. App. 1967) *error ref. n.r.e.*

[28] 410 S.W.2d 633 (Tex. 1967).

[29] *Id.* at 637.

[30] *Id.*

[31] Richards v. Consolidated Underwriters, 411 S.W.2d 436 (Tex. Civ. App. 1967) *error ref.*

[32] TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967).

other insurance company and no fraud or other equitable ground was alleged which would have prevented the statute from running.

In another case, instead of filing notice with the Industrial Accident Board of unwillingness to abide by a final award within twenty days after the award,[33] the claimant filed suit in the district court six days after the award. Eleven days after the Board's award, the Board received notice from the district clerk of the filing of the suit. The insurance company contended that the trial court had no jurisdiction of the attempted appeal from the award since proper notice had not been given to the Board. The claimant asserted that the letter from the district clerk was substantial if not strict compliance with the statute and relied upon the well-established rule that the workmen's compensation law should be liberally construed in favor of the claimant. The court of civil appeals, reversing its original opinion, on motion for rehearing upheld claimant's contention.[34] This case is typical of the numerous recent cases which have liberally construed the Act.

Angelina Casualty Co. v. Bennett[35] held that a judgment approving a compromise settlement which covered future medical expenses was not within the power conferred on a court in workmen's compensation cases. The judgment was binding upon both parties. It could be set aside only in an independent proceeding alleging fraud or other equitable grounds for rescission or cancellation, and not by withdrawing consent before the judgment is reduced to writing. But, the court of civil appeals reasoned that the approval of a compromise settlement agreement does not constitute an appealable award or an appealable judgment. Therefore, the court had no jurisdiction of an appeal from the approved agreement, just as the trial court would have no jurisdiction over an appeal from a compromise settlement approved by the Industrial Accident Board.

Variance in Nature of Claim. The rule of *Booth v. Texas Employers' Insurance Ass'n*[36] has been followed in two cases which overruled pleas to the jurisdiction based upon a variance between the claim filed before the Industrial Accident Board and the claim asserted in court. The *Booth* rule states that it is the identity of the incident or occurrence that controls when there is a claim of variance, and the claim may be enlarged in court to include all injuries resulting from the accident.

In one case, claimant filed a claim for occupational disease before the Board, alleging that the first distinct manifestation of the disease occurred on March 5, 1963.[37] The occupational disease and the cause thereof were described as an injury or irritation of lung tissues and bronchi caused by breathing gas fumes from furnaces in the plant. In court he alleged he sustained an accidental personal injury from inhaling noxious gas and

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[33] *Id.*

[34] Liberty Mut. Ins. Co. v. Smith, 410 S.W.2d 27 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[35] Angelina Cas. Co. v. Bennett, 415 S.W.2d 271 (Tex. Civ. App. 1967).

[36] 132 Tex. 237, 123 S.W.2d 322 (1938).

[37] Consolidated Underwriters v. Wright, 408 S.W.2d 140 (Tex. Civ. App. 1966) *error ref. n.r.e.*

fumes on both March 5, 1963, and on July 29, 1963. In another case, the claim before the Board was for a heart attack while the pleading in court described the injury as damage to head, neck, shoulder and back.[38] In both cases the claims were sustained using the *Booth* rationale.

Good Cause. The courts followed prior holdings that issues as to good cause for not filing a claim for compensation within six months from the date of the injury were raised by evidence: that the insurer's adjuster had advised claimant that he would take care of everything;[39] that claimant, who could not read or write, believed his supervisors had filed the necessary papers;[40] that claimant thought his injuries were not serious;[41] and, that claimant was mentally or physically incapacitated to file a claim for compensation for a period of fifteen months after his injury.[42]

In another case involving good cause,[43] insurer's verified answer stated that plaintiff had not given timely notice of injury to his employer. The answer did not negate the possibility that the employer had received notice from some other source, such as from the insurer. On the day of trial, insurer filed an amended answer which negated all possibility of notice being received by the employer. The jury found that notice had not been given, but could not resolve the issue inquiring if plaintiff had good cause for failing to give notice. The trial court declared a mistrial. Plaintiff sought mandamus from the court of civil appeals to compel the trial court to disregard the issue of good cause and to enter judgment for plaintiff, contending that insurer's amended answer was insufficient to raise the issue of good cause. Plaintiff asserted that the amended answer violated the rules[44] which require a verified denial of notice to be filed seven days before trial, and therefore, the denial was insufficient to raise the issue. In denying mandamus the court relied on the principle that an appellate court will not review by mandamus the action of a trial court in granting a new trial while the trial court still has jurisdiction of the cause.

IV. PROCEDURE

Venue. Without discussing the matter, the court of civil appeals seemed to assume that proving a prima facie cause of action was a necessary element in establishing venue in a plea of privilege suit where claimant was seeking to recover compensation under the Texas law for an injury received outside of Texas.[45]

Evidence. During the preceding year numerous cases have concerned evi-

[38] Travelers Ins. Co. v. Strech, 416 S.W.2d 591 (Tex. Civ. App. 1967) *error ref. n.r.e.*
[39] *Id.*
[40] Continental Cas. Co. v. Abercrombie, 413 S.W.2d 409 (Tex. Civ. App. 1967) *error ref. n.r.e.*
[41] King v. Texas Employers' Ins. Ass'n, 416 S.W.2d 533 (Tex. Civ. App. 1967) *error ref. n.r.e.*; Texas Employers' Ins. Ass'n v. Brown, 408 S.W.2d 931 (Tex. Civ. App. 1966) *error ref. n.r.e.*
[42] Maryland Cas. Co. v. Spritzman, 410 S.W.2d 668 (Tex. Civ. App. 1967) *error ref. n.r.e.*
[43] Allen v. Long, 408 S.W.2d 342 (Tex. Civ. App. 1966) *error dismissed.*
[44] TEX. R. CIV. P. 93(n); TEX. REV. CIV. STAT. ANN. art. 8307(b) (1967).
[45] Texas Employers' Ins. Ass'n v. Thomas, 415 S.W.2d 18 (Tex. Civ. App. 1967).

dentiary matters. The courts proved to be fairly liberal in admitting evidence in workmen's compensation cases.

Admissibility. Among the many cases involving admissibility[46] those involving hospital records were the most significant. Where claimant testified that before his injury he had never worn a back brace and had never been hit in the back with an axe, a doctor's report contained in hospital records was admitted to show that such injury had occurred and that the patient had worn a lumbo-sacral back brace.[47] This evidence was admitted in spite of the fact that the doctor could not be sure that it was a copy of his consultation report and could not find out who had written his name on the report.

Sufficiency. In addition to cases involving admissibility, a large number of decisions turned on the question of whether the evidence was sufficient to support a causal connection between the injury and disability.[48] In related cases the Texas appellate courts reviewed numerous decisions on the question of the sufficiency of the evidence to prove the extent of the

[46] In the following situations evidence was held to be *admissible*: Proof of fact and beneficial results of surgery voluntarily assumed by employee subsequent to an award of the Board and prior to trial, Houston Fire & Cas. Co. v. Dieter, 409 S.W.2d 838 (Tex. 1966); exhibition of claimant's wife's leg and foot when limited to the lump sum issue (illustrating one advantage of conceding lump sum), Angelina Cas. Co. v. Russell, 410 S.W.2d 852 (Tex. Civ. App. 1967) *error ref. n.r.e.*; notation of diagnosis of treating physician on hospital records, Weicher v. Insurance Co. of N. America, 415 S.W.2d 220 (Tex. Civ. App. 1967) *error granted*; opinion of a doctor who perhaps took into consideration information related to him by the claimant's wife who accompanied the claimant when the doctor took claimant's case history from him (and evidently from claimant's wife too), Texas Employers' Ins. Ass'n v. Steadman, 415 S.W.2d 211 (Tex. Civ. App. 1967) *error ref. n.r.e.*; hearsay statements of claimant's doctor to show compliance with the doctor's instructions, Hartford Accident & Indem. Co. v. Ferguson, 417 S.W.2d 376 (Tex. Civ. App. 1967) *error ref. n.r.e.*

It was held that the following evidence was properly *excluded*: Testimony of a doctor of insurer's choice in reference to claimant's neck and shoulder injuries, since claimant's attorney had agreed that the doctor could examine what was going to be exhibited and claimant exhibited only his arm, Universal Underwriters Ins. Co. v. Potter, 411 S.W.2d 400 (Tex. Civ. App. 1966) *error ref. n.r.e.*; and, a prior petition for total and permanent disability from a hernia where the subsequent case involved a back injury, Hartford Accident & Indem. Co. v. Ferguson, 417 S.W.2d 376 (Tex. Civ. App. 1967) *error ref. n.r.e.* The appellate court in the latter case apparently assumed the role of a medical expert in holding that a prior hernia would have no bearing on the claimed low back disability.

[47] Allstate Ins. Co. v. Davis, 415 S.W.2d 244 (Tex. Civ. App. 1967) *error ref. n.r.e.*

[48] The evidence was held *sufficient* to support a causal connection between the injury and disability under the following circumstances: Where the medical expert testified he thought that the coronary occlusion resulted from heavy exertion, Aetna Cas. & Sur. Co. v. Scruggs, 413 S.W.2d 416 (Tex. Civ. App. 1967); where in response to a hypothetical question, the doctor testified that claimant's fall contributed to his mental disorder, Texas Employers' Ins. Ass'n v. Steadman, 415 S.W.2d 211 (Tex. Civ. App. 1967) *error ref. n.r.e.*; and, where all the evidence was sufficient to support the jury's finding that a prior and subsequent injury did not contribute to claimant's incapacity, Travelers Ins. Co. v. Munos, 415 S.W.2d 541 (Tex. Civ. App. 1967).

The evidence was held *insufficient* to support a causal connection between the injury and the disability under the following circumstances: Where a heavy bundle of clothes fell towards the deceased and caused her body to be jerked violently in the area of her head and neck in a whiplash fashion, causing a cervical sprain, and she later died from a malignant brain tumor, since the medical evidence did no more than express a medical possibility that the injury could have caused aggravation or excitement of the pre-existing brain tumor, Insurance Co. of N. America v. Myers, 411 S.W.2d 710 (Tex. 1966); where the evidence showed no connection between claimant's lumbar sacral sprain and her third degree syphilis, American Sur. Co. v. Semmons, 413 S.W.2d 732 (Tex. Civ. App. 1967) *error ref. n.r.e.*; where there was no medical evidence of causal connection between claimant's heat exhaustion and her swollen arm and general debility, Weicher v. Insurance Co. of N. America, 415 S.W.2d 220 (Tex. Civ. App. 1967) *error granted*; and, where the only evidence of total disability was that claimant did not return to work for four weeks following his injury, at which time he continued to suffer pain in his back, Sonnier v. Texas Employers' Ins. Ass'n, 417 S.W.2d 433 (Tex. Civ. App. 1967).

injury.[49] Because of their volume, these cases can be treated only cursorily here.

The courts have held fast to the rule that an injury must extend to and effect some part of the body other than a specific member in order to enlarge a specific injury into a general injury. The evidence was held sufficient to enlarge a specific injury into a general injury where the claimant caught three fingers of her right hand in a grinder while pushing pecans toward it and the injury to her three fingers extended to and affected her shoulder or neck, thereby causing incapacity.[50] But, the evidence was held insufficient to enlarge a specific partial incapacity into total permanent incapacity where claimant fell from a truck and injured his right

[49] In the following situations the evidence was held to be *sufficient* to support judgments for the following extents of disability: Total and permanent disability where five lay witnesses and two medical witnesses testified, Consolidated Underwriters v. Wright, 408 S.W.2d 140 (Tex. Civ. App. 1966) *error ref. n.r.e.*; three hundred weeks of total disability followed by partial disability where the only three witnesses were claimant, his wife, and his brother, Aetna Cas. & Sur. Co. v. Brewer, 411 S.W.2d 629 (Tex. Civ. App. 1966) *error ref. n.r.e.*; total and permanent disability supported by claimant's own testimony alone, Travelers Ins. Co. v. White, 413 S.W.2d 157 (Tex. Civ. App. 1967) *error ref. n.r.e.*; total and permanent disability where the only testimony was by the claimant and three lay witnesses with no expert witnesses to prove extent of the injury, Hartford Acc. & Indem. Co. v. Ferguson, 417 S.W.2d 376 (Tex. Civ. App. 1967) *error ref. n.r.e.*; two weeks total disability and no partial disability where a doctor testified that at the time claimant was discharged from the hospital, after three days stay in traction to reduce muscle spasm, claimant was markedly improved and the doctor believed that with an additional week of rest, claimant would be all right, Aguirre v. Pan Am. Ins. Co., 417 S.W.2d 900 (Tex. Civ. App. 1967); fifteen weeks disability where, in spite of a successful operation for an admitted hernia, the claimant sued only for a back injury and supporting evidence was given by the claimant's brother and a medical opinion was based on claimant's statement to the medical expert, Williams v. Westchester Fire Ins. Co., 414 S.W.2d 210 (Tex. Civ. App. 1967); total and permanent disability where claimant secured a job as a sales trainee making three times as much as he was making at the time of his injury but his back and neck prevented his securing employment in fields in which he had experience, Traders & Gen. Ins. Co. v. Pittsford, 411 S.W.2d 755 (Tex. Civ. App. 1967) *error ref. n.r.e.*; total and permanent disability where claimant resumed hard labor for the same employer and earned more money than he earned before injury, since he worked only because he had no other way to eat and feed his family, Consolidated Underwriters v. Whittaker, 413 S.W.2d 709 (Tex. Civ. App. 1967) *error ref. n.r.e.*; total and permanent disability where claimant was pulling on a heavy material to make blue jeans notch in the crotch and had a pop in her wrist and pain in her arm, shoulder and neck, Travelers Ins. Co. v. Heim, 413 S.W.2d 796 (Tex. Civ. App. 1967); total and permanent disability caused by heat exhaustion where the employee was engaged in the performance of duties that subjected him to a greater hazard of heat exhaustion than ordinarily applied to the general public, Commercial Standard Ins. Co. v. Allred, 413 S.W.2d 910 (Tex. 1967); total and permanent disability where being struck in the face by a grinder caused a mental disorder, according to the opinion of a psychiatrist and the original treating doctor, Texas Employers' Ins. Ass'n v. Steadman, 415 S.W.2d 211 (Tex. Civ. App. 1967) *error ref. n.r.e.*; total and permanent disability where claimant was making more as a preacher after the injury than he was previously making as a stock clerk (evidently this Baptist Preacher had a tither in his tank), Aetna Cas. & Sur. Co. v. Curlee, 416 S.W.2d 890 (Tex. Civ. App. 1967).

In the following cases appellate courts held that the judgment was *not* sufficiently supported: Where the evidence, including the doctor's testimony, did no more than express medical possibility that the injury caused aggravation or excitement of a pre-existing brain tumor, Insurance Co. of N. America v. Myers, 411 S.W.2d 710 (Tex. 1966); where testimony was to the effect that third degree syphilis could have been or possibly was aggravated by alleged injuries, American Sur. Co. v. Semmons, 413 S.W.2d 732 (Tex. Civ. App. 1967) *error ref. n.r.e.*; where there was no evidence that cancer of the lung was caused by being struck in the abdomen and chest by a heavy steel beam as there was no medical testimony to establish a connection between the blow and the cancer, Texas Employers' Ins. Ass'n v. Gallegos, 415 S.W.2d 708 (Tex. Civ. App. 1967); and, where there was no evidence that claimant was disabled by heat exhausion or that claimant was exposed to a greater hazard by reason of employment than the general public, in which case an instructed verdict was held to be proper, Weicher v. Insurance Co. of N. America, 415 S.W.2d 220 (Tex. Civ. App. 1967) *error granted.*

[50] United States Fid. & Guar. Co. v. Hernandez, 410 S.W.2d 224 (Tex. Civ. App. 1966) *error ref. n.r.e.*

arm, resulting in tenderness where the deltoid muscle attaches to the humerus and radiating pain through his shoulder.[51] The evidence was also insufficient where burns to claimant's fingers and hand did not cause extension of injury to some part of the body other than the specific members.[52]

Wage Rate. One court held that the evidence was sufficient to fix claimant's average weekly wages under subsection 2 of the definition of "Average Weekly Wages"[53] where the claimant was being paid $25.81 per week but had not worked 210 days during the year immediately preceding his injury. Another employee of the same class had worked 210 days of the preceding year in the same or similar employment in the same or in a neighboring place and had earned $65.00 per week during the days he was employed.[54] Moreover, where claimant's wife testified that the work of a pipe fitter was different from that of a millwright, the evidence was held sufficient to support an award basing claimant's average weekly wage upon the wages of another pipe fitter who had worked 210 days as a pipe fitter during the preceding year. Other cases, however, were reversed because the wage rate was not supported by the evidence.[55]

V. THE JURY

Improper Information and Argument to Jury. An insurer claimed it was reversible error for the claimant's attorney to read to the jury that portion of his pleading regarding maximum compensation under the Workmen's Compensation Act. The court held that, while it is better practice not to read to the jury those portions of the pleadings with which the jury is not concerned, such reading does not constitute reversible error in the absence of a showing of prejudice. The court failed to find a reading of such pleadings resulted in such prejudice as to warrant a reversal.[56] During the past year the courts adhered to the rule that, before an improper argument will constitute reversible error, it must appear that the argument was reasonably

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[51] Aetna Cas. & Sur. Co. v. Dooley, 410 S.W.2d 314 (Tex. Civ. App. 1966).

[52] Casualty Reciprocal Exch. v. Rodriguez, 415 S.W.2d 236 (Tex. Civ. App. 1967).

[53] TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1967).

[54] Central Sur. & Ins. Corp. v. Jordan, 410 S.W.2d 60 (Tex. Civ. App. 1966).

[55] In one case the court of civil appeals held that the trial court had erred in rendering judgment on the theory of another's employment and earning capacity under the provisions of subsection 2 of the Wage Rate Statute, TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1967), where the cab driver claimant had worked only 156 days during the year immediately preceding his injury and had earned $597.58, and his average earnings during the six or seven years that he had previously worked for this company were approximately $736.00. Travelers Ins. Co. v. Liptrap, 413 S.W.2d 144 (Tex. Civ. App. 1966) *error ref. n.r.e.* While the evidence showed that there were other employees who had worked at least 210 days during the year immediately preceding claimant's injury, these employees were cab drivers paid on a commission basis. Their earnings varied from $7.00 to $15.00 per day and none of them had received the same amount per day or per week as claimant had been paid. Thus, it was not practical to compute claimant's average weekly wages on the basis of the earnings of the other drivers.

The court of civil appeals in Sonnier v. Texas Employers' Ins. Ass'n, 417 S.W.2d 433 (Tex. Civ. App. 1967), affirmed the trial court's directed verdict for the insurance carrier. The claimant was seeking compensation for partial incapacity but was unable to offer any evidence from which the jury could have found a wage rate. The court stressed that, while there is a statutory minimum wage rate in the case of total incapacity (TEX. REV. CIV. STAT. ANN. art. 8306, § 10), no such provision is applicable for partial incapacity.

[56] Hartford Accident & Indem. Co. v. Ferguson, 417 S.W.2d 376 (Tex. Civ. App. 1967) *error ref. n.r.e.*

calculated to and probably did cause the rendition of an improper judgment.[57]

Court's Charge. In *Standard Insurance Co. v. Allred*[58] the Texas Supreme Court held that a special issue which asked, "Do you find from a preponderance of the evidence that Leroy Allred sustained an injury to his body as a result of a heat exhaustion on or about April 9, 1963?" did not assume that a heat exhaustion had occurred and was not a comment on the weight of the evidence. The trial court did not err in submitting such an issue to the jury.

One trial court's definition of "injury" was held prejudicial to the defendant insurer since it allowed the jury to consider the possible effect of the injury on all of claimant's pre-existing bodily conditions.[59] The trial court failed to limit the jury's consideration of possible aggravation to those pre-existing conditions for which expert evidence could show a reasonably probable causal connection.

Another trial court's definition of "injury" was held prejudicial to a claimant for being too exclusive.[60] The definition included a reference to possible aggravation of a pre-existing disease but failed to also encompass the possibility of aggravation of a pre-existing natural cause of bodily infirmity or condition. In another case there was no proper medical evidence to connect plaintiff's lung cancer to his injury and it was held reversible error for the trial court to refuse to submit to the jury an issue as to whether lung cancer was the sole cause of claimant's incapacity.[61]

Where plaintiff based his claim solely on a general injury and the insurer pleaded only a general denial, insurer was not allowed to submit a defensive special issue inquiring whether plaintiff's disability was limited to the loss of use of his right arm.[62]

[57] Coal Operators Cas. Co. v. Richardson, 414 S.W.2d 735 (Tex. Civ. App. 1967) *error ref. n.r.e.* (not reversible error where claimant's attorney argued outside the record that claimant was going his usual way home, made a direct reply to the argument of insurer's counsel that claimant was a liar, guilty of criminal acts and not worthy of belief, and gave unsworn testimony that insurer had subpoenaed records and had not used them, since trial court, on insurer's objection, instructed jury to disregard these arguments); Travelers Ins. Co. v. Heim, 413 S.W.2d 796 (Tex. Civ. App. 1967) (not reversible error where counsel for claimant referred to insurer as being like an octopus which squirts when it gets into trouble since the argument could not have persuaded any juror of ordinary intelligence); Wallace v. Liberty Mut. Ins. Co., 413 S.W.2d 787 (Tex. Civ. App. 1967) *error ref. n.r.e.* (held not reversible error where insurer's counsel referred to four jurors by name, called attention to claimant's mimeographed petition which showed that claimant's attorney had so much workmen's compensation business that he had to have his petitions mimeographed, inquired why claimant did not bring in three other doctors who had examined claimant, and argued that he would not ask the jury to believe him if he did not believe his case to be true and sincere, since these improper arguments were not of the incurable type, and no objection had been made); Consolidated Underwriters v. Whittaker, 413 S.W.2d 709 (Tex. Civ. App. 1967) *error ref. n.r.e.* (not reversible error where court instructed jury not to consider argument of plaintiff's counsel that a medical witness for insurer had admitted that he missed the diagnosis in a previous trial of another case that week); Travelers Ins. Co. v. White, 413 S.W.2d 157 (Tex. Civ. App. 1967) *error ref. n.r.e.* (not reversible error when argument indicated that a verdict in claimant's favor would entitle him to future medical benefits); Angelina Cas. Co. v. Russell, 410 S.W.2d 852 (Tex. Civ. App. 1967) *error ref. n.r.e.* (improper argument referring to claimant's wife's unrelated injuries not reversible error).

[58] 413 S.W.2d 910 (1967).

[59] American Sur. Co. v. Semmons, 413 S.W.2d 732 (Tex. Civ. App. 1967) *error ref. n.r.e.*

[60] Gill v. Transamerica Ins. Co., 417 S.W.2d 720 (Tex. Civ. App. 1967).

[61] Texas Employers' Ins. Ass'n v. Gallegos, 415 S.W.2d 708 (Tex. Civ. App. 1967).

[62] Universal Underwriters Ins. Co. v. Potter, 411 S.W.2d 400 (Tex. Civ. App. 1966) *error ref. n.r.e.*

Verdict of the Jury. Findings that a claimant had suffered a total disability which commenced on May 14, 1965, and other findings that he had suffered partial disability on May 14, 1965, were held to be in fatal and irreconcilable conflict, as a person cannot be totally and partially incapacitated at the same time.[63] Moreover, the finding that the average weekly wage-earning capacity of a claimant during the existence of his partial incapacity was "none" was conflicting within itself as a person who has no wage-earning capacity is totally and not partially incapacitated.

VI. Benefits and Beneficiaries

Operation. In *Royal Indemnity Co. v. Dennis*[64] the Texas Supreme Court followed the statutory provision,[65] holding that where surgery to relieve hernia was unsuccessful but the employee sustained total disability for only six weeks, he was entitled to compensation for only six weeks of total disability. This was so even though under the statute the employee would have been entitled to compensation for twenty-six weeks had the operation been successful, since the statute expressly provides that if an operation is not successful an employee shall be paid compensation under the general provisions, the same as if the operation had not been undertaken.

The federal court likewise applied the statutory provision[66] in a case where the Board ordered, but the employee refused to submit to, an operation for a back injury. The court held that the provision of the Act in reference to such an operation adopted the liabilities which are provided in the case of a hernia, so that the employee was limited to fifty-two weeks compensation.[67]

In another case, where the Industrial Accident Board ordered an operation for a hernia in the absence of one member of the Board, the order was void and claimant was entitled to total and permanent incapacity in view of the jury finding to that effect.[68]

Medical Expenses. Where claimant was entitled to workmen's compensation benefits, civil appeals decisions indicated that he was also entitled to medical expenses,[69] even though he did not originally make an express demand that the insurance carrier furnish the additional medical services.[70] The court in one case[71] stated that the intent behind the provisions of section 7 of article 8306[72] requires that the carrier be responsible for furnishing all reasonable and necessary medical care for any compensable injury,

[63] Travelers Ins. Co. v. Amason, 413 S.W.2d 956 (Tex. Civ. App. 1967). An excellent discussion will be found in Comment, *A Special Issue Quandary—Submitting "Partial Incapacity" in Workmen's Compensation*, 21 Sw. L.J. 513 (1967).

[64] 410 S.W.2d 185 (Tex. 1966).

[65] Tex. Rev. Civ. Stat. Ann. art. 8306, § 12b (1967).

[66] *Id.* § 12e.

[67] Duncan v. Fidelity & Cas. Co., 371 F.2d 646 (5th Cir. 1967).

[68] Wolff v. Travelers Ins. Co., 410 S.W.2d 36 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[69] Maryland Cas. Co. v. Spritzman, 410 S.W.2d 668 (Tex. Civ. App. 1967) *error ref. n.r.e.*

[70] Texas Employers' Ins. Ass'n v. Steadman, 415 S.W.2d 211 (Tex. Civ. App. 1967) *error ref. n.r.e.*; Trinity Universal Ins. Co. v. Farley, 408 S.W.2d 776 (Tex. Civ. App. 1966).

[71] Trinity Universal Ins. Co. v. Farley, 408 S.W.2d 776 (Tex. Civ. App. 1966).

[72] Tex. Rev. Civ. Stat. Ann. art. 8306, § 7 (1967).

whether or not a previous express demand has been made by claimant, as long as a proper notice of injury has been given.

In *Pearce v. Texas Employers' Insurance Ass'n*[73] the Texas Supreme Court dealt with a case of first impression involving a compromise settlement. Claimant and insurer entered into a settlement agreement encompassing future medical aid, hospital services, nursing, and medicines. Thereafter, claimant had a recurrence of the physical disability and filed another claim for compensation. The supreme court agreed with the lower court's decision that the prior compromise settlement precluded another claim. The compromise settlement was held not to be ineffective to prevent a future claim as being in contravention of section 5 of article 8307.[74] That statute only prevents an award or judgment for future medical expenses from being res judicata to a second claim; there is no similar statutory prohibition regarding a compromise settlement.

Subrogation Suit. In a court of civil appeals case,[75] the workmen's compensation insurer, who had paid $1,711.85 to the injured claimant, sought to enforce its subrogation rights against a third party. The third party denied liability to the insurer on the ground that he had already paid the employee $1,000 in settlement, and had obtained a release from the employee. The trial court entered judgment for the third party based on the release and because of the jury finding that the employee had been contributorily negligent in causing the accident. In reversing, the court of civil appeals restated the rule of *Pan American Insurance Co. v. Hi-Plains Haulers*[76] that:

> [T]he third party's negligence need not be judicially established before the compensation carrier is entitled to assert its claim for subrogation and, where the employee and the third party entered into a settlement, both employee and the third party were liable to the carrier for the amount so paid, up to the amount of compensation paid by the carrier to the employee.[77]

In another case, the release of a third party by the employee before a compensation payment had been made or assumed was held to destroy the insurer's right of subrogation against the third party and was a bar to compensation proceedings by the employee against the insurer, even though the release purported not to affect such compensation.[78] In a similar case, a claimant, by proceeding to claim and collect benefits under the Workmen's Compensation Act, was precluded on the grounds of election, estoppel, and res judicata from thereafter maintaining a common law action for

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[73] 412 S.W.2d 647 (Tex. 1967).

[74] TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967).

[75] Home Indem. Co. v. Thompson, 407 S.W.2d 530 (Tex. Civ. App. 1966).

[76] Pan American Ins. Co. v. Hi-Plains Haulers, 163 Tex. 1, 350 S.W.2d 644 (1961). *See generally*, Note, *Settlement of Third Party Liability in Workman's Compensation*, 21 Sw. L.J. 692 (1967).

[77] 163 Tex. at 5, 350 S.W.2d at 646.

[78] Warneke v. Argonaut Ins. Co., 407 S.W.2d 834 (Tex. Civ. App. 1966) *error ref. n.r.e.*; TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (1967).

damages, either actual or exemplary, against a fellow employee for injuries resulting from an intentional blow struck by the fellow employee.[79]

In a Fifth Circuit case[80] the beneficiaries of four deceased employees claimed and collected workmen's compensation benefits under the laws of Oklahoma for the death of the employees. The accident occurred when the employees were returning from Texas, where their employer had some work, to Oklahoma, where their employer's main operations were. Since the laws of Oklahoma do not provide for any right of subrogation in connection with a death action, the insurer who covered the employer's operations in both Texas and Oklahoma could not assert a right of subrogation under the Texas law against the third party.

Maturity Suit. In a suit under the statute[81] for the full amount of the matured award, twelve per cent penalty, and reasonable attorney's fees, the court of civil appeals affirmed the judgment for claimant. The court held that "claims drafts" did not constitute sufficient "payment" to preclude a maturity suit and that mailing weekly installments to the post office for delivery to "Addressee only" did not constitute a proper tender.[82] Claimant's attorney wrote insurer a letter on June 9, 1967, objecting to the medium of payment. The letter was received on Friday, June 11, and on Monday, June 14, the maturity suit was filed. The court held that insurer waived any claim of justifiable cause for late payment by failing to request any such findings in the trial court.

In another case, both the claimant and the insurer had given notice of appeal from the award of the Industrial Accident Board but neither had filed suit in time to perfect an appeal.[83] Claimant filed suit for the accrued compensation benefits, medical expenses, twelve per cent penalty, and attorney's fees. The court held that the insurer's appeal from an adverse judgment in the claimant's maturity suit could not attack the Board's original award of medical payments to the claimant on the ground of vagueness. Such an attempt would be a collateral attack on the Board's award; the award was a final order within the meaning of the statute and timely appeal from that award had not been made.

Death Beneficiaries. In *Turner v. Travelers Insurance Co.*[84] the Texas Supreme Court held that a dependent child of a deceased employee was entitled to death benefits to the exclusion of the mother of the employee. In a second case, children who had been adopted by third parties were held to be entitled to death benefits for the death of their natural father to the exclusion of the parents of the deceased employee.[85]

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[79] Heibel v. Bermann, 407 S.W.2d 945 (Tex. Civ. App. 1966); TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (1967).

[80] Argonaut Ins. Co. v. Panhandle & S.F.R.R., 367 F.2d 564 (5th Cir. 1966).

[81] TEX. REV. CIV. STAT. ANN. art. 8307, § 5a (1967).

[82] Home Ins. Co. v. Gutierrez, 409 S.W.2d 450 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[83] General Accident, Fire & Life Assur. Corp. v. Hames, 416 S.W.2d 894 (Tex. Civ. App. 1967).

[84] 406 S.W.2d 897 (Tex. 1966).

[85] Patton v. Shamburger, 413 S.W.2d 155 (Tex. Civ. App. 1967) *error granted.*

VII. Conclusion

It has been said that "hard facts make bad law," but as illustrated above, they also make good law. In the workmen's compensation field, slightly different facts and unprecedented situations make lots of law, and, so far, the volume of workmen's compensation cases in the appellate courts of Texas is keeping pace with the population explosion, with new angles arising every year.